

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

H. ALLAN SPIKER)	
Claimant)	
VS.)	
)	Docket No. 213,763
PRATT & LAMBERT UNITED, INC.)	
Respondent)	
AND)	
)	
WAUSAU INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

All three parties appealed the Award dated January 13, 1998, entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on August 5, 1998.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Larry D. Shoaf of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Judge Frobish awarded claimant permanent partial general disability benefits for a 7 percent whole body functional impairment.

Claimant contends he is entitled to an award for a work disability. Respondent and its insurance carrier contend that claimant should not receive any benefits because he allegedly violated a safety procedure when he failed to use a ladder to descend from a 39 inch high platform and, instead, jumped to the floor. Additionally, they contend claimant has not satisfied his burden to prove either a functional impairment or work disability.

The only issues before the Appeals Board on this review are:

- (1) Did claimant willfully fail to use a guard or protection so as to prevent him from receiving workers compensation benefits under K.S.A. 44-501(d)(1)?
- (2) If not, what is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

- (1) On April 24, 1996, while working for Pratt & Lambert United, Inc., the claimant, H. Allan Spiker, hurt his back and neck when he spontaneously and thoughtlessly jumped to the floor from a 39 inch high platform.
- (2) After being off work and receiving medical treatment for several weeks, Mr. Spiker returned to work for Pratt & Lambert without medical restrictions. Upon his return to work, Mr. Spiker was eased back into his work routine as he was given lighter work and allowed to leave work early as his back dictated.
- (3) In September 1996, Mr Spiker began working a regular 40-hour work week, plus any overtime that was offered.
- (4) Because of the sale of Pratt & Lambert to another company, the overtime that Mr. Spiker and his co-workers worked for several months before the April 1996 accident was unusually high as compared to that available when he returned to work after the accident.
- (5) From September 1996 through March 1997, Mr. Spiker worked overtime hours. Beginning in April 1997, Mr. Spiker's overtime hours were discontinued after he presented a doctor's slip that purportedly limited him to working only 8 hours per day. Since April 26, 1997, Mr. Spiker has been working 8 hours per day, 5 days per week, but no overtime.
- (6) Before the accident Mr. Spiker worked 6 days per week. The Administrative Law Judge found that his average weekly wage for the date of accident was \$640.80. Because the parties do not dispute that finding, the Appeals Board adopts it as its own.
- (7) The Appeals Board is not persuaded that the injury has caused Mr. Spiker to have any permanent work restrictions or limitations. The Appeals Board agrees with Judge Frobish's analysis that Dr. Murati's opinions should be given little weight. Likewise, the Appeals Board finds that Mr. Spiker has failed to prove he has any work restrictions or limitations as a result of the April 1996 accident.
- (8) The Appeals Board agrees with the Judge's conclusion that Mr. Spiker has a 7 percent whole body functional impairment as a result of this accident. That conclusion is

supported by the opinion of orthopedic surgeon Jacob Amrani, M.D., who saw Mr. Spiker in both June 1996 and April 1997 and who testified that the 7 percent rating was supported by both the Third and Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment.

CONCLUSIONS OF LAW

(1) Pratt & Lambert and its insurance company contend Mr. Spiker's injury resulted because he violated a safety rule when he jumped down from the 39 inch platform. They contend not using a ladder constitutes a willful failure to use a guard or protection and, therefore, Mr. Spiker violated K.S.A. 44-501(d), which provides in part:

If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

(2) In addition, K.A.R. 51-20-1 provides:

The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

(3) The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in Bersch¹ and the Court of Appeals in a much more recent decision in Carter² have defined "willful" to necessarily include:

. . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.' Carter at 85.

(4) The mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.³

(5) The Appeals Board finds that Mr. Spiker jumped from the platform in a spontaneous and thoughtless act and did not do so with a headstrong or stubborn disposition. The

¹Bersch v. Morris & Co., 106 Kan. 800, 189 Pac. 934 (1920).

²Carter v. Koch Engineering, 12 Kan. App. 2d 74, 735 P.2d 247 (1987), *rev. denied* 241 Kan. 838 (1987).

³Thorn v. Zinc, Co., 106 Kan. 73, 186 Pac. 972 (1920).

Appeals Board concludes that Mr. Spiker's actions did not rise to a willful failure to use a guard or protection and, therefore, K.S.A. 44-501(d) does not prevent him from receiving workers compensation benefits for this accidental injury.

(6) When a worker is able to return to work without accommodation and earn a comparable wage, that worker is not entitled to receive permanent partial disability benefits in excess of the functional impairment rating although economic circumstances later cause the worker to lose his job.⁴

(7) The Watkins rationale applies here. When workers are physically able to return to work and if it is only economic circumstances that prevent them from earning a comparable wage, their permanent partial disability percentages are limited to their functional impairment rating.

(8) Because Mr. Spiker has sustained a permanent injury that has not affected his ability to perform his occupation and earn a comparable wage, his permanent partial general disability benefits should be based on his 7 percent whole body functional impairment rating.

(9) The Appeals Board adopts Judge Frobish's findings and conclusions to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated January 13, 1998, entered by Administrative Law Judge Jon L. Frobish should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Larry D. Shoaf, Wichita, KS
Jon L. Frobish, Administrative Law Judge

⁴Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

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Philip S. Harness, Director